

*26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.*

*(Also Part I, § 42; 1.42–5.)*

## **Rev. Proc. 2004–38**

### **SECTION 1. PURPOSE**

This revenue procedure informs owners of qualified low-income housing projects how to obtain the waiver from the Internal Revenue Service of the annual recertification of tenant income (waiver) provided in § 42(g)(8)(B) of the Internal Revenue Code.

### **SECTION 2. BACKGROUND**

Section 1.42–5 of the Income Tax Regulations provides the minimum requirements that a housing credit agency's (Agency's) compliance monitoring procedure must contain to satisfy its compliance monitoring duties under § 42(m)(1)(B)(iii). Section 1.42–5(b)(1)(vi) provides that an Agency must require an owner to keep records for each qualified low-income building in the project that show for each year in the compliance period the annual income certifications of each low-income tenant per unit. Section 1.42–5(b)(1)(vii) provides that an Agency must require an owner to keep documents for each qualified low-income building in its project for each year in the compliance period that support each low-income tenant's income certification. Section 1.42–5(c)(1)(iii) provides that an Agency must require an owner to certify at least annually that, for the preceding 12-month period, the owner has received an annual income certification from each low-income tenant and documentation supporting that certification.

Section 42(g)(8)(B) provides that on application by the taxpayer, the Secretary may waive any annual recertification of tenant income for purposes of § 42(g) if the entire building is occupied by low-income tenants (a 100 percent low-income building). Low-income tenants are individuals occupying a rent-restricted unit in a qualified low-income housing project whose

combined income satisfies the § 42(g)(1) income limitation elected by the owner of the project.

### SECTION 3. SCOPE

This revenue procedure applies to Agencies and owners of qualified low-income housing projects that consist entirely of 100 percent low-income buildings.

### SECTION 4. PROCEDURE FOR OBTAINING A WAIVER UNDER § 42(g)(8)(B)

An owner applying for the waiver for its 100 percent low-income building must (1) complete and sign the applicable portions of the Form 8877, *Request for Waiver of Annual Recertification Requirement for the Low-Income Housing Credit*, (2) have the Agency responsible for monitoring the building for compliance with § 42 sign the applicable portion of the form, and (3) file the form with the Service pursuant to the instructions accompanying the form. A copy of the 2004 version of Form 8877 is included in the appendix to this revenue procedure. The Service will notify the owner whether the request for waiver has been approved or denied. See section 5.02 of this revenue procedure for the period the waiver is in effect.

### SECTION 5. EFFECT OF OBTAINING A WAIVER UNDER § 42(g)(8)(B)

.01 If an owner of a 100 percent low-income building obtains a waiver of the annual income recertification from the Service, the owner will be exempt from the recertification requirements of § 1.42-5(b)(1)(vi) and (vii) and § 1.42-5(c)(1)(iii). As a result, the owner is not required under those sections to (1) keep records that show an annual income recertification of all the low-income tenants in the building who have previously

had their annual income verified, documented, and certified; (2) maintain documentation to support that recertification; or (3) certify to the Agency responsible for monitoring the building for compliance with § 42 that it has received this information.

.02 The waiver takes effect on the date the Service approves the waiver. Once the waiver takes effect, it remains in effect until the end of the 15-year compliance period (defined in § 42(i)(1)), unless the waiver is revoked, in which case the waiver ceases to be in effect on the date of revocation. See sections 5.04 and 5.05 of this revenue procedure regarding revocations.

.03 Obtaining the waiver will not prevent an owner from having to produce documentation to verify the owner's compliance with § 42 upon an examination of the owner's federal income tax return. Thus, for example, the owner must keep records and documentation that show the income of tenants upon initial occupancy of any residential unit in the building. In addition, except as provided in section 5.01 of this revenue procedure, obtaining the waiver will not prevent an owner from having to satisfy the requirements of the compliance monitoring procedure adopted by the Agency responsible for monitoring the building for compliance with § 42.

.04 The Service may revoke the waiver if the building ceases to be a 100 percent low-income building or if the Service determines that an owner has violated § 42 in a manner that is sufficiently serious to warrant revocation. In any case, the Service will revoke the waiver if the Agency requests, in accordance with the instructions to Form 8877, that the Service revoke the waiver.

.05 A waiver will be automatically revoked if there is a change in the ownership for federal tax purposes of the 100 percent low-income building (including a

change resulting from a termination of a partnership under § 708). In this case, the owner that received the waiver must notify the Service of the revocation in accordance with the instructions to Form 8877. The new owner may apply for a waiver.

.06 An Agency's compliance monitoring procedure will not fail to satisfy § 42(m)(1)(B)(iii) solely because the 100 percent low-income buildings to which the waiver applies have been exempted from the recertification requirements of § 1.42-5(b)(1)(vi) and (vii) and § 1.42-5(c)(1)(iii). Nonetheless, the Agency's compliance monitoring procedure must continue to require that an owner satisfy the requirements in § 1.42-5(b)(1)(vi) and (vii) and § 1.42-5(c)(1)(iii) upon a tenant's initial occupancy of any residential rental unit in the building.

.07 A 100 percent low-income building to which the waiver applies continues to be subject to the review requirements of § 1.42-5(c)(2).

### SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 94-64, 1994-2 C.B. 797, is superseded. Waivers obtained under Rev. Proc. 94-64 are not affected by this revenue procedure.

### SECTION 7. EFFECTIVE DATE

This revenue procedure is effective for applications filed on or after July 6, 2004.

### DRAFTING INFORMATION

The principal author of this revenue procedure is David Selig of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure, contact Mr. Selig at (202) 622-3040 (not a toll-free call).

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## APPENDIX



## General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

### Purpose of Form

Owners of certain low-income housing buildings use Form 8877 to request the annual income recertification waiver provided for in section 42(g)(8)(B). See Rev. Proc. 2004-38, 2004-27 I.R.B., for more information on obtaining the waiver. You can find Rev. Proc. 2004-38 at [www.irs.gov/pub/irs-irb04-27.pdf](http://www.irs.gov/pub/irs-irb04-27.pdf).

### Who May File

The owner of a 100% low-income building may request the waiver. A 100% low-income building is a building entirely occupied by low-income tenants, who are individuals occupying a rent-restricted unit in a qualified low-income housing project whose combined income satisfies the section 42(g)(1) income limitation elected by the owner.

### How To File

Owners must complete and sign Part I, Certification, and have the housing credit agency responsible for monitoring the building(s) (compliance monitoring agency) sign that part. The owner must also complete, sign Part II, Consent of Disclosure to Monitoring Agency, and send the completed Form 8877 to the Internal Revenue Service (IRS). The IRS will not consider an owner's request unless both Parts I and II of Form 8877 are properly completed.

### Where To File

File Form 8877 with:

Internal Revenue Service  
P.O. Box 331  
Attn: LIHC Unit, DP 607 South  
Philadelphia Campus  
Bensalem, PA 19020

### Determination

The IRS will notify the owner by mail that the request for waiver has been approved or denied. If the request is approved, the IRS will mail the owner a copy of the approved Form 8877. The waiver takes effect on the date that the IRS approves the waiver.

**Note:** Keep a copy of the approved Form 8877 for the building's records. It must remain a part of the building's records regardless of any ownership transfer.

### Effects of Obtaining a Waiver

The following apply to a building on which a waiver is in effect.

**1. Records.** While a waiver is in effect, the owner is exempt from the recertification requirements of Regulations sections 1.42-5(b)(1)(iv) and (vii) and 1.42-5(c)(1)(iii) for each building to which the waiver applies. Thus, the owner is not required to keep records that show an annual income recertification for all the low-income tenants in the building who have previously had their annual income verified, documented, and certified; maintain documentation to support that recertification; or certify to the compliance monitoring agency that it has received this information. Having a waiver in effect, however, does not relieve the owner of having to produce documentation in support of the requirements of section 42, including keeping records and documentation that show each tenant's annual income upon the tenant's initial occupancy of any unit in the building and, except for the exempted recertification requirements, satisfying the compliance monitoring procedure adopted by the compliance monitoring agency.

**2. Effective Period of Waiver.** The waiver takes effect on the date the IRS approves the waiver. It remains in effect until the end of the 15-year compliance period (defined in section 42(i)(1)), unless the waiver is revoked, in which case it ceases to be in effect on the date of revocation.

**3. Revocation.** The IRS may revoke the waiver if the building ceases to be a 100% low-income building or if the IRS determines that the owner has violated section 42 in a manner that is sufficiently serious to warrant revocation.

The IRS will revoke the waiver if the compliance monitoring agency requests its revocation. To request revocation of a waiver, the compliance monitoring agency must send a letter to the IRS requesting that the waiver be revoked. The request must include the

following information: (1) the name and address of the compliance monitoring agency; (2) the name and telephone number of the agency official familiar with the facts of the request whom the IRS may contact; (3) the name, address, and building identification number(s) of the building(s) or project; (4) the name, address, and taxpayer identification number of the building owner; and (5) a statement explaining why the waiver should be revoked. The request should be sent to the address for filing Form 8877 and a copy of the request must be provided to the building owner. The compliance monitoring agency and building owner will be notified by mail when the IRS revokes the waiver.

A change in the ownership of the building for federal tax purposes (including a change resulting from the termination of a partnership under section 708) will cause the waiver to be revoked automatically as of the change in ownership. The new owner may apply for a waiver. In the case of such an automatic revocation, the building owner that received the waiver must notify the IRS of the revocation no later than 60 days after the automatic revocation occurs. The notification should be sent to the address for filing Form 8877 and include the following information: (1) the name, address and building identification number(s) of the building(s) or project; (2) the name, address and taxpayer identification number of the building owner; (3) the date of the automatic revocation; and (4) an explanation of the event that caused the automatic revocation. After receiving the notification of an automatic revocation, the IRS will notify the compliance monitoring agency.

**4. Consent of Disclosure.** In applying for the waiver, the owner must consent to disclosure by the IRS to the compliance monitoring agency of any revocation of the waiver. This consent of disclosure is effective beginning on the date the waiver takes effect and ending on the date that the compliance period of the building(s) ends, unless the waiver is revoked, in which case the consent ends immediately following the disclosure by the IRS of the revocation to the compliance monitoring agency.

## Privacy Act and Paperwork Reduction Act Notice

We ask for the information on this form to carry out the Internal Revenue laws of the United States. We need it to ensure you are complying with these laws and to allow us to figure and collect the right amount of tax. Sections 6001, 6011 and 6012(a) require you to provide the requested information for purposes of requesting the waiver of the annual income recertification under section 42(g)(8)(B). Section 6109 requires you to provide your social security number or other identifying number. Routine uses of this information include disclosing it to the Department of Justice for civil and criminal litigation and to other federal agencies, as provided by law. We may disclose the information to cities, states, the District of Columbia, and U.S. Commonwealths or possessions to administer their tax laws. We may also disclose this information to other countries under a tax treaty, or to federal and state agencies to enforce federal nontax criminal laws and to combat terrorism. The authority to disclose information to combat terrorism expired on December 31, 2003. Legislation is pending that would reinstate this authority. If you do not file this information, or provide incomplete or fraudulent information, you may not obtain the relief requested and may be subject to interest, penalties, and/or criminal prosecution.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

<b>Recordkeeping</b> . . . . .	5 hr., 15 min.
<b>Learning about the law or the form</b> . . . . .	1 hr., 17 min.
<b>Preparing, copying, assembling, and sending the form to the IRS</b> . . . . .	1 hr., 25 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Tax Products Coordinating Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001. Do not send Form 8877 to this address. Instead, see *Where To File* on this page.

